IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO.....

BENNIE LAZAROV, as individual d.b.a. TENNESSEE METAL PRODUCTS COMPANY and LAZAROV BROS.,

Petitioner

vs.

ARNOLD SCHWINN & COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes petitioner, Bennie Lazarov, an individual doing business as Tennessee Metal Products Company and Lazarov Brothers and presents this his petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit and in support thereof says:

I

STATEMENT OF MATTER INVOLVED

This litigation grew out of a contract for the sale of certain steel tubing by the petitioner to respondent on February 21, 1948. The tubing was shipped by common carrier f.o.b. Memphis, Tennessee, to respondent at Chicago, Illinois, and a sight draft with bills of lading attached was drawn on respondent by petitioner and forwarded for collection. Respondent paid the draft, obtained the bills of lading and upon tender of delivery of the tubing by the common carrier, respondent rejected the same and refused to accept it on the theory that it did not conform to the specifications in the purchase order. Respondent promptly notified petitioner of the rejection, offered to return the tubing and demanded refund of the purchase price already paid. Petitioner insisted that the tubing conformed in all respects to the specifications and refused to accept respondent's offer to return the tubing. Neither party acted to dispose of the tubing and the carrier being unable to obtain instructions from either respondent or petitioner, after notice to each and advertisement, sold the tubing for a price less than the freight and storage charges.

Thereafter this suit was brought by respondent to recover the purchase price paid. At the conclusion of the evidence, the District Court charged in substance, that in order for respondent to recover, it must establish by a preponderance of the evidence, three essential facts: *First,* that a contract existed between respondent and petitioner, whereby petitioner agreed to supply respondent with seamless steel tubing in accordance with certain specifications as to quality, composition, size and

condition; *second*, that there was a breach of warranty on the part of the petitioner, the effect of which amounted to a want of consideration in that the petitioner failed to furnish respondent with the kind and type of steel tubing he had agreed to furnish and supply; and, *third*, within a reasonable time after the discovery of such failure of consideration and recission of the contract, the respondent returned or offered to return the tubing to petitioner, and made demand for the return of the money paid. At the conclusion of the District Court's charge, petitioner tendered certain special requested instructions, based upon Section 7262 (5) of the Tennessee Code, on the theory that even if the tubing failed to meet the specifications of the purchase order, and that respondent took all steps necessary to properly rescind the contract and tender the return of the tubing, nevertheless, respondent owed a duty to the petitioner under Section 7262 (5) of the Tennessee Code, to protect and dispose of the tubing as bailee for petitioner upon petitioner's refusal to accept the offer to return the tubing, in order to minimize the loss. The District Court refused to give such special requested instructions, to which action petitioner excepted. The case was thereupon submitted to a jury and verdict was rendered for respondent for the purchase price plus interest from date of the rejection of the tubing and notice to petitioner and judgment was entered accordingly.

Appeal was timely perfected by petitioner to the United States Court of Appeals for the Sixth Circuit where the judgment was affirmed in an opinion rendered June 2, 1950. In that opinion the Circuit Court of Appeals held that petitioner's special requests embodied a correct statement of the law, but that Section 7262 (5)

of the Tennessee Code was inapplicable to the facts of this case for the reason that in this case, as a matter of law, there was no refusal on the part of the petitioner to accept respondent's offer to return the tubing. Such Court then affirmed the judgment of the District Court.

A petition for rehearing was timely filed, but denied without opinion on September 19, 1950.

This petition is filed to review and correct the action of the United States Court of Appeals for the Sixth Circuit in affirming the judgment of the District Court and in denying the petition to rehear.

II

JURISDICTIONAL STATEMENT

(A) THE STATUTORY PROVISION BELIEVED TO SUSTAIN THE JURISDICTION.

The Act of June 25, 1948, C 646, 62 Stat. 928; Title 28, United States Code, section 1254 provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree";

It is contended by petitioner that the above quoted statutory provision by its express terms confers jurisdiction upon this Court to review the action of the United States Court of Appeals for the Sixth Circuit.

(B) THE STATE STATUE INVOLVED.

The state statute involved is that part of the Uniform Sales Act of Tennessee appearing as Section 7262 and 7243 of the 1932 Code of Tennessee dealing with remedies for breach of warranty, the pertinent parts of which read as follows:

1 "7262. Remedies for breach of warranty.—(1) Where there is a breach of warranty by the seller, the buyer may, at his election: . . .

"(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them to the seller and recover the price or any part thereof which has been paid. . . .

"(3) Where the goods have been delivered to buyer, he cannot rescind the sale if he knew of the breach or warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

"(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods; or immediately after an offer to return the goods in exchange for repayment of the price.

"(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer

shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 7246. . . ."

"7243. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."

Petitioner particularly relies upon the provisions of Section 7262 (5) and contends that the offer of respondent to return the tubing was refused by petitioner and thereupon respondent became obligated as a bailee to care for and dispose of the tubing at the best price obtainable and thereby reduce the loss.

(C) THE DATE OF FINAL JUDGMENT SOUGHT TO BE REVIEWED AND DATE OF FILING PETITION.

The final judgment of the United States Circuit Court of Appeals denying petition to rehear was entered September 18, 1950, and this petition for a writ of certiorari is filed prior to the expiration of ninety days from the rendition of such judgment pursuant to Section 2101 U. S. C.A. subsec. (c).

III

QUESTIONS PRESENTED

The Court of Appeals for the Sixth Circuit, in its opinion, apparently conceded that Section 7262 (5) of the Tennessee Code would have placed a duty on respondent to protect and dispose of tubing at the best price obtain-

able in order to prevent complete loss of the merchandise shipped, if there had been a refusal by petitioner to accept respondent's offer to return the tubing. The Court of Appeals then went on to hold that as a matter of law there was no refusal on the part of petitioner to accept respondent's offer to return the tubing, and that consequently, Section 7262 (5) of the Tennessee Code was inapplicable, and that respondent, having complied with the other applicable provisions of the Uniform Sales Act of Tennessee, was entitled to recover the full purchase price paid.

It is earnestly insisted by petitioner that the evidence clearly established a refusal on the part of the petitioner to accept respondent's offer to return the tubing, and the action of the Court of Appeals in holding as a matter of law, that there was no such refusal constitutes reversible error. Petitioner insists that at the very least the question of petitioner's refusal to accept respondent's offer to return the tubing upon recission of the contract, should have been submitted to the jury as one of the material issues in this case, under appropriate instructions.

Accordingly, the sole question presented by this petition is:

> WAS THERE SUFFICIENT EVIDENCE ADDUCED AT THE TRIAL TO REQUIRE SUBMISSION TO THE JURY, UNDER APPROPRIATE INSTRUCTIONS, OF THE MATERIAL ISSUE AS TO WHETHER PETITIONER REFUSED RESPONDENT'S OFFER TO RETURN THE TUBING UPON RESPONDENT'S RECISSION OF THE CONTRACT?

IV

REASONS FOR ALLOWANCE OF THE WRIT

1. The failure of the trial court to charge the special requests of petitioner embodying § 7262 subsection (5) of the Tennessee Code, constituted a denial of petitioner's right to have the issues, properly presented by the pleadings and the evidence, submitted to the jury in violation of petitioner's constitutional right to a jury trial upon all the material issues, and thus the affirmance of the judgment by the Circuit Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

2. The determination of the questions presented is of vital importance to business men throughout the country. It is common knowledge that frequently and customarily purchasers at distant points order merchandise through correspondence. Where controversy arises between the buyer and the seller, concerning whether the goods meets the specifications of the order, the seller is frequently at a great disadvantage because of the geographical distance, in ascertaining whether the claims of the rejecting buyer are well founded. It frequently happens that the seller, in good faith, honestly insists and believes the goods fully conformed, and the buyer, likewise in good faith, insists and believes that they do not conform. In such a situation it is only fair and just that the buyer at the distant city, who has possession of the bills of lading and easy access to the goods themselves, must, on refusal of the seller to accept the return of the merchandise, exercise reasonable diligence to preserve and prevent loss of goods, either through deterioration or accumulation of freight and storage charges. No hardship can result to the buyer, as he would, of course, be

entitled to deduct from the proceeds of the sale of the goods, any expenses incurred in connection with such sale, and he could apply the excess of such expenses in repayment of the purchase price if it later developed, after protracted litigation as in this case, that the goods did not conform.

Petitioner has been unable to find any case where both the buyer and the seller stubbornly insisted on their respective contentions and neither acted to preserve the goods. In every case interpreting what appears as 7262 (5) of the Tennessee Code, one or the other parties invariably undertook to dispose of the goods. Unquestionably the buyer has a right to do so, and apply the proceeds, first to the expense of selling the same, and the balance in repayment of the purchase price paid pro tanto. Petitioner has been unable to find any case imposing a duty on the buyer under such circumstances as appear in the instant case to protect and dispose of the tubing, and petitioner avers that a decision is necessary to determine upon whom the duty must fall to act to minimize the loss in similar situations. The importance of such decision, to ordinary business men, is apparent upon consideration of the vast amount of goods moving in interstate commerce under facts similar to those in the present instance.

PREMISES CONSIDERED PETITIONER PRAYS:

1. That a writ of error issue to the United States Court of Appeals for the Sixth Circuit, directing said Court and the Clerk thereof, to certify and transmit to this Court the entire record and proceedings in this case, including the opinion and judgment of the Court of Appeals for the Sixth Circuit.

2. That the judgment of the United States Court of Appeals be reviewed and the errors complained of corrected and that such judgment be reversed and a new trial granted petitioner.

3. That petitioner have all such other further and general relief to which he is entitled.

This is the first application for a writ of certiorari in this case.

Respectfully submitted:
MILES, RUBERT & MILES
Attorneys for Petitioner.

By_____
LOVICK P. MILES

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Lovick P. Miles, of the firm of Miles, Rubert & Miles, attorneys for the petitioner in the foregoing petition, being first duly sworn, state that the facts set forth in the foregoing petition are true to the best of my knowledge, information and belief.

_____

Subscribed and sworn to before me this_____day of December, 1950.

_____
Notary Public

Supreme Court of the United States

OCTOBER TERM, 1950

No.....

BENNIE LAZAROV, an Individual, d.b.a.
TENNESSEE METAL PRODUCTS COMPANY and
LAZAROV BROS.,

Petitioner,

vs.

ARNOLD SCHWINN & COMPANY,

Respondent

BRIEF OF PETITIONER, BENNIE LAZAROV, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OFFICIAL REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported in 183 Federal 2nd 673.

GROUNDS ON WHICH JURISDICTION INVOKED

This Court's jurisdiction is invoked under provision of Title 28, USCA Section 1254, which expressly empowers this Court to review the judgment of the Circuit Court of Appeals.

STATEMENT OF THE CASE

Petitioner, defendant below, will hereafter be referred to as Seller, and respondent, plaintiff below, will hereinafter be referred to as Buyer.

This is a suit to recover the purchase price of Seven Thousand Five Hundred Twenty-two ($7,522.00) Dollars, paid under a contract for the purchase of steel tubing, which was rejected by the buyer because of its alleged failure to comply with the specifications in the purchase order. (R 1) The seller denied that the tubing did not meet specifications and denied that he was indebted to the buyer for any sum. (R 4)

On February 11, 1948, the buyer, of Chicago, Illinois, forwarded its purchase order for a quantity of tubing of certain specifications, to the seller at Memphis, Tennessee (R 6, 11, Ex. 1), and the tubing was shipped f.o.b. Memphis, as agreed, on the same day, and a sight draft, with bills of lading attached, was forwarded to the buyer. The buyer paid the draft and obtained the bills of lading. (R 7, 12, Ex. 3, 4 and 5.) The carrier, Plaza Express Company, sent the tubing to the buyer's plant and before unloading, the buyer examined the tubing and rejected the same, ordering the carrier to return the tubing to the seller. (R 12) The carrier returned the tubing to its Chicago Terminal where it remained in their trailers upon their yard for approximately one month and was then removed to its warehouse. During that time the carrier was attempting to obtain disposition. (R 15, 43.)

Immediately upon rejecting the tubing, the buyer telephoned the seller and advised him of its rejection and offered to return the tubing, which offer was refused by

the seller. (R 12) The buyer then forwarded a letter under date March 1, 1948, to the seller, offering to return the tubing, and requesting repayment of the purchase price. (R 12, Ex. 6) The seller, through his attorneys in Chicago, refused to accept this offer to return the tubing. (R 13, Ex. 7) No further communications took place between the parties with reference to the tubing. (R 17) The buyer instituted this suit on December 29, 1948 to recover the purchase price paid with interest.

In May, 1948, the buyer sent its engineer or expert to examine the tubing at the Plaza Express Company warehouse in Chicago (R 21, 23) and several months later learned that the tubing was advertised for sale. (R 15) The tubing was sold in November, 1948, By Plaza Express Company for Eighteen Hundred Dollars ($1,800.00), which was less than the freight and accumulated storage charges. (R 43) (R 61)

The buyer's chief witness and purchasing agent, testified that steel tubing required care and that it had to be regularly oiled to be preserved. (R 17) Other witnesses testified that oiling was necessary to prevent rusting. (R 42) The buyer made no effort to dispose of the tubing after its rejection and after the seller refused to accept its return and made no effort to protect the tubing, retaining the bills of lading. (R 16, 18, 19, 23)

At the conclusion of the plaintiff's proof, the defendant made a motion for a directed verdict, stating that the plaintiff had failed to minimize the damages, which motion was overruled. (R 24)

The defendant and his witnesses testified as to the quality of the tubing and with reference to their refusal to accept the return of the tubing. (R 25-62)

At the conclusion of all the proof, defendant renewed his motion for a directed verdict, which motion was overruled. (R 66)

Prior to the Court charging the jury, the defendant tendered five special requests, which were refused. (R 67) (R 84, 85, 86, 87) At the conclusion of the Court's charge the defendant tendered two more requests, being numbers VI and VII, which were also refused. Exceptions were taken to the Court's rule in both instances (R 81, 82) (R 87) The case was submitted to the jury who rendered a verdict in favor of the plaintiff for the sum paid by the plaintiff as the purchase price of the tubing with interest and a judgment was accordingly entered. (R 89) The defendant filed his motion for a judgment notwithstanding the verdict, or for a new trial. (R 90), contending that the Court should have directed a verdict in favor of the defendant because of the failure of the plaintiff, the buyer, to dispose of the tubing after the seller's refusal to accept its return and that the Court erred in refusing to give defendant's special instructions. (R 84, 87) From the order overruling such motion, the defendant gave timely notice of appeal, filed proper supersedeas bond (R 93) and perfected his appeal to the Circuit Court of Appeals for the Sixth Circuit, (R 93-99) where the judgment of the District Court was affirmed (R 114-117) and after petition for rehearing was denied (R 123) this petition for writ of Certiorari is being presented.

ASSIGNMENT OF ERROR

The Circuit Court of Appeals erred in holding as a matter of law that petitioner did not refuse respondent's offer to return the tubing and that consequently Section 7262 (5) of the Tennessee Code of 1932 was inapplicable.

That subsection is quoted verbatim herewith for ready reference and provides:

> "(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 7246. . . ."

ARGUMENT

Petitioner raises only a single issue by his petition for a writ of certiorari. While the evidence was violently conflicting on the question as to whether the tubing conformed to the specifications of the purchaser, the general jury verdict for respondent precludes petitioner on that point. Petitioner also concedes that proper and timely steps were taken by respondent to rescind the contract and offer to return the goods and demand repayment of the purchase price paid.

However, petitioner contends that he refused to accept the offer of respondent to return the goods, and that thereupon respondent became a bailee for the petitioner with a lien on the tubing to secure the repayment of the purchase price. Under such circumstances, petitioner contends respondent owed a duty to act reasonably to protect, and if necessary, dispose of the tubing for petitioner's account at the best price obtainable, in order to minimize the loss.

The Circuit Court of Appeals for the Sixth Circuit approved this contention of petitioner as a general rule

of law, under the provision of the above quoted section of the Uniform Sales Act of Tennessee, but then found, as a matter of law, that petitioner had not refused to accept respondent's offer to return the tubing and consequently no such duty rested on respondent. It is this finding of fact that is challenged by the petition for certiorari. Petitioner contends that the evidence clearly showed the refusal to accept this offer to return the tubing by respondent, or at the very least the evidence was conflicting on this point, and that this question should have been submitted to the jury as one of the material issues in the case.

PROPOSITION OF FACT

PETITIONER REFUSED TO ACCEPT RESPONDENT'S OFFER TO RETURN THE TUBING UPON RESPONDENT'S RECISSION OF THE CONTRACT.

The only correspondence between the parties concerning the offer to return by respondent and petitioner's refusal is contained in two letters. One dated March 1, 1948, addressed by respondent to petitioner, (Ex. 6, R 12), and petitioner's reply thereto through his attorneys, Downs and Scheib by a letter dated March 10, 1948. (Ex. 7, R 13). Since these exhibits are forwarded as the originals they are reproduced verbatim herein for ready reference and read as follows:

Exhibit 6.

ARNOLD, SCHWINN & CO.
1718 North Kildare Avenue
Chicago 39, Illinois

March 1, 1948

Tennessee Metal Products Company
814 Scott Avenue
Memphis, Tennessee

Attention: Mr. Roy Michaels

Dear Mr. Michaels:

This will acknowledge our telephone conversation of last Friday relative to shipment of steel tubing from Lazarov Brothers, Memphis, for your account. When this material was delivered to us via Plaza Trucking Lines, we inspected the material and tried making parts from the tubing but found that it was impossible to use. After talking with your Mr. Smith, we directed the Plaza Trucking Lines to return the material to the shipper. Later in the afternoon, I talked with you and you agreed with our actions.

No definite agreement was reached regarding the transportation costs of this material. We realize that the cost of transportation normally would have been for our account, but in view of our not being able to use the material, we will offer to pay 50 per cent of the transportation cost to Chicago and back to Memphis. We hope that this arrangement will be satisfactory to you.

Since we have already paid for this material through Continental Illinois National Bank in the amount of

$7522.00, we ask that you return our payment by return mail.

As mentioned over the telephone, we are still interested in seeing the samples of your pedals when you have a pedal which you feel will be equal or superior to the samples which I gave you. Mr. Smith mentioned that you were not yet satisfied with the finish of some of the parts in your pedal, and we suggest that samples be withheld until you are fully satisfied yourself with the pedal.

Yours very truly,

ARNOLD, SCHWINN & COMPANY
S/R. J. Williamson
R. J. Williamson

RJW/jt

Exhibit 7.

Law Offices
DOWNS & SCHEIB
Chicago, Ill.
March 10, 1948

Arnold, Schwinn & Co.
1718 North Kildare Avenue
Chicago, Illinois

Attention: Mr. R. J. Williamson

Gentlemen:

Your letter of March 1, 1948, to Tennessee Metal Products Company relative to a shipment of steel tubing, has been referred to us as their counsel for reply.

Correspondence with our clients indicates that we cannot consider your offer of fifty per cent of the trans-

portation costs as there is a strong possibility that additional damages may arise in disposing of the material which is still in Chicago.

I will be pleased to discuss further plans of settlement at your convenience.

Very truly yours,

/s G. R. SCHEIB

GRS:EVF

A reading of the above two exhibits clearly establishes that petitioner declined to accept respondent's offer to return the tubing, as the language used in Exhibit 7 states that respondent's offer was unacceptable.

In addition to the correspondence above set forth, the record reveals the following facts and circumstances establishing that petitioner refused respondent's offer to return the tubing:

1. Respondent knew that petitioner had not accepted the offer to return the tubing because it knew that the tubing was taken back by the common carrier and stored in its warehouse in Chicago, Illinois, and remained there for several months; respondent received a notice that the tubing was being offered for sale by the common carrier. (R15-19)

2. The carrier notified both petitioner and respondent that the shipment had been refused. (R 62)

3. Petitioner's agent refused to accept the offer to return the tubing made by telephone immediately upon

rejection of the tubing by respondent, (R 46) and did not agree to take the tubing back, (R 47-48-49-50-59-60)

4. Petitioner instructed his attorneys that he would not accept the return of the tubing and did not agree to accept its return (R 27, 28), and refused to accept its return. (R 32, R 34)

5. Respondent sent an inspector to inspect the tubing at the common carrier's warehouse in Chicago over two months subsequent to the offer of return. (R 21, R 23).

Petitioner earnestly contends that when petitioner's reply (Ex. 7), read as an answer to respondent's offer to return the tubing (Ex. 6), and the subsequent facts and circumstances as disclosed by the above record citations to the oral testimony are considered, particularly the inaction of the petitioner, the knowledge of such inaction by the respondent, and the knowledge by the respondent that the carrier was disposing of the tubing for freight and storage charges, it is clearly established that petitioner refused respondent's offer to return the tubing and that respondent was aware of such refusal.

PROPOSITIONS OF LAW

I

If a condition is affixed to the acceptance by the party to whom the offer is made or any modification of, or change in, the offer is made or requested, there is a rejection of the offer, which puts an end to the negotiation, unless the party who made the original offer renews it or assents to the modification suggested.

12 Am. Jur. Sec. 53, p. 544, See *Phoenix Iron & Steel Co. v. Wilkoff Co.* (CCA 6th) 253 F. 165.

Petway v. Loews Nashville and Knoxville Corp., 22 Tenn. App. 59; 117 S. W. 2d. 975.

II

Issues of fact should be submitted to the jury where there is a conflict in the evidence, where more than one reasonable inference may be drawn from the testimony, where there is any discrepancy in the testimony, or where the determination of the issue depends upon the credibility of the witnesses.

53 Am. Jur. Sec. 172, p. 149-150, *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350; 63 S. Ct. 1062
Western Union Tel. Co. v. Lamb, 140 Tenn. 107, *Hall v. Nash*, 184 Tenn. 312; 198 S.W. 2d. 649
Best v. District of Columbia, 291 U.S. 411, 78 L. Ed. 882, 54 S. Ct. 487.
Moulder v. American L. Ins. Co., 101 U.S. 708, 25 L. Ed. 1077.

III

In a case being tried by a jury, the Court should not undertake to pass on and decide issues of fact. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and to disregard the province of the jury is to impinge on the constitutional right to a jury trial.

Slocum v. N. Y. L. Ins. Co., 228 U.S. 367, 57 L. Ed. 879, 35 S. Ct. 323.
Berry v. U. S., 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945.
Conway v. O'Brien, 312 U.S. 492, 61 S. Ct. 634, 85 L. Ed. 969.

IV

Where a buyer in Chicago, Illinois, buys steel tubing from a seller in Memphis, Tennessee, f.o.b. Memphis, pays the purchase price and obtains the bills of lading, but upon delivery by the carrier and inspection, refuses to accept the tubing for alleged failure to comply with specifications of the purchase order and elects to rescind the contract and offers to return the tubing to the seller, such buyer, upon the seller's refusal to accept the offer to return the tubing, is under a duty to use reasonable diligence to protect, and if necessary sell at the best price obtainable in order to prevent loss through deterioration or accumulation of storage charges.

Uniform Sales Act of Tennessee, Sec. 7262 (5);
Rubin vs. Sturdevant, 80 Fed. 930;
Jones vs. Bloomgarden, 106 N.W. 891 (Mich.);
Pleak vs. Marks, et al, 171 Iowa 551, 152 N.W. 63;
Strauss vs. Nat. Parlor Fur., 76 Miss. 343, 24 So. 703;
Benjamin on Sale, Sixth Ed. Page 1150 and 1153;
Wilson & Co. vs. Werk, 104 Ohio 507, 136 N.E. 202;
Bordes vs. Weaver, 44 N.E. (2d) 130 (Ohio 1942);
Robinson vs. Main, 290 N.W. 539 (Iowa 1940);
Baker vs. Watson Co., 134 P. (2d) 613 (Idaho 1943);
Jones vs. Healy, 237 App., 264, 261 N.Y.S. 464 (1932);
Kahn vs. J. C. Management, 59 N.Y. S. 547;
Grainger Bros. vs. Amsinck Co., 15 Fed. (2d) 329 (8th Cir.);
Morris vs. Prefabrication Eng. Co., 160 Fed. (2d) 779;
Williston on Sales, Revised Edition. Secs. 496, 497, 498, 569, 610;
55 C. J. 297, Sec. 282;
Gant vs. Cutting-Larson Co. 181 N.Y.S. 581;

Uniform Laws Anno. Vol. 1, Sales Act. Sec. 69 and annotations beginning P. 415;
Cannon vs. Chadwell, 25 Tenn. App. 42.

In the case of Cannon vs. Chadwell, supra, where the buyer elected to rescind sale on account of a misrepresentation by the seller, and tendered the business sold back to the seller, who refused such offer of return, and the buyer, after notice sold the business for the best price obtainable, the Tennessee Court of Appeals aptly stated the rule as follows:

> "Where the seller refuses to accept return of the property the buyer may and *should*, at the seller's expense, resell the property for the seller's account, at the best price obtainable, and account and give credit for the proceeds, after giving prior notice to the seller of the contemplated resale of his account. 55 C. J. 297, Sec. 282; Code Sec. 7262; *Hardwick vs. Can Co.* 113 Tenn. 657, 88 S.W., 797."

APPLICABILITY OF THE FOREGOING PROPOSITIONS OF LAW TO THE FACTS

It is apparent that the language contained in petitioner's Attorney's reply (Ex. 7) to respondent's offer to return the tubing (Ex. 6) adds an additional condition varrying the terms of the original offer, namely, a question concerning the additional expense in the disposition of the tubing. This constitutes such a modification or change in the terms of the original offer, which when coupled with the words, "We cannot accept your offer," clearly shows a written refusal of respondent's offer to return.

AS TO MATERIALITY OF THE ISSUE

The District Court charged that the law in this case is "governed by the Uniform Sales Act of Tennessee,"

and then quoted what he considered the applicable sections (R 73), however, the District Judge declined to charge the petitioner's special requests Nos. II through VI, embodying a statement of respondent's duties under Sec. 7262 (5) of the Tennessee Code. (R 67, 83, 84; R 84-87). These requested instructions embodied the applicable law on material issues of fact which were timely raised by the evidence at the trial. There was much testimony on this question of refusal to accept the offer to return the tubing and on the question of respondent's acts to preserve and dispose of the same. Respondent's own purchasing agent on direct examination, took the view that petitioner's letter (Ex. 7) advised that petitioner "could not accept the offer to return the goods" (R 13). Respondent knew that the common carrier took this tubing back and stored it in their warehouse in Chicago, that it remained there for several months, that it heard that the carrier later disposed of the tubing, and that it received a notice enclosing an advertisement stating that the tubing was being offered for sale by the carrier (R 15). Vigorous cross examination of respondent's witness was directed to show a knowledge that petitioner had refused to accept the offer of return of the tubing, (R 15, 16) and it clearly appeared that respondent did nothing to protect or dispose of the tubing after its rejection. (R 16, 17; R 18, 19)

Petitioner's contentions were fully set out in the requested instructions II through VI (R 84-87) and in the reasons for the exceptions of the petitioner to the Court's failure to give such requested instructions (R 83, 84) Petitioner and his agents all testified that they refused to accept the offer of the return of the tubing. (R 28, R 32, R 43, R 46, R 47, 48, R 49, 50, R 59, 60) Throughout the

entire record below, petitioner insisted on this point and it was one of the material issues in the lawsuit.

THE QUESTION OF PETITIONER'S REFUSAL TO ACCEPT RESPONDENT'S OFFER TO RETURN SHOULD HAVE BEEN SUBMITTED TO THE JURY UNDER APPROPRIATE INSTRUCTIONS.

The 7th Amendment to the Constitution of the United States provides:

"In suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact decided by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Supreme Court of the United States has repeatedly said that it is, "the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal for trying facts in courts of law."

Berry v. U. S., 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945;
Conway v. Obrien, 312 U.S. 492, 61 S. Ct. 634, 85 L. Ed. 696.

In the case of *Slocum vs. N. Y. Life Insurance Company*, 228 U.S. 364, 35 S. Ct. 323, 57 L. Ed. 879, the facts were these:

Suit was instituted on a policy of life insurance to recover the face value thereof, less the amount of a loan placed on the policy by the decedent. The determinative issue was whether an arrangement by an agent of the

insurance company with the wife of decedent for accepting a partial payment and executing a blue note which was never executed, operated to keep the policy in force. At the conclusion of the trial the jury found for the plaintiff and on appeal the Court of Appeals for the Third Circuit reversed and directed a judgment for the defendant. On certiorari to the Supreme Court the finding of the Court of Appeals that the evidence was insufficient to sustain the finding that the policy was kept in force through the arrangement between decedent's wife and the agent, was approved, but on the question of the propriety of the Circuit Court of Appeals directing a verdict for the defendant instead of ordering a new trial, the Supreme Court said, after reviewing the decisions construing the 7th Amendment to the United States Constitution:

"These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that Court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How then could it be said that there was not an infraction of the 7th Amendment? When the verdict was set aside, the issues of fact were left undetermined and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of common law, could be had only through a new trial, with the same right to a jury trial as before. Disregarding those rules, the Circuit Court of Appeals itself

determined the facts, without any trial. Thus it assumed a power it did not possess and cut off plaintiffs right to have the facts settled by a jury."

Thereupon a new trial was ordered.

While the facts in that case were different from those in the instant case the same principles enunciated therein are applicable. In the present case the jury below never had a chance, due to the failure of the District Judge to give petitioner's requested instructions, to pass upon the material question as to plaintiff's refusal to accept respondent's offer to return the tubing. The action of the Circuit Court of Appeals for the Sixth Circuit in concluding as a matter of law, that there was no such refusal, deprived petitioner of his constitutional right to have this disputed issue determined by a jury.

CONCLUSION

Petitioner respectfully urges that the evidence established that petitioner refused respondent's offer to return the tubing upon rescission of the contract and that thereupon respondent owed a duty to protect, and if good judgment demanded, sell the tubing before its value was consumed by deterioration and storage charges. Further, that respondent's failure to discharge this duty precluded recovery.

While respondent's witness took the view that petitioner did not refuse to accept the offer to return the tubing, (R 15, 16, R 18) petitioner insists that this testimony simply created a conflict in the evidence, which, required the submission of this disputed issue to the jury as the finders of fact. The refusal of the District Judge to charge petitioner's special requests II through VI, and

the finding by the Court of Appeals that petitioner did not refuse the offer to return the tubing constituted a denial of petitioner's constitutional right of trial by jury as to a material issue of fact and violated the principles of law herein relied upon. The judgment of the Circuit Court of Appeals must be reversed and the cause remanded for a new trial.

Respectfully submitted,

MILES, RUBERT & MILES

By_____

Attorneys for Petitioner

FILED
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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 459

BENNIE LAZAROV, an individual
d/b/a TENNESSEE METAL PRODUCTS
COMPANY and LAZAROV BROS.,
Petitioner

v.

ARNOLD, SCHWINN & COMPANY,
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

HAMILTON E. LITTLE,
JOHN S. MONTEDONICO,
H. D. BURGESS.
Counsel for Respondents.

The Daily News, Memphis, Tenn., 1/12/51—47c.

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